No. 21130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of Supplemental Decision and Order of the National Labor Relations Board.

BRIEF FOR PETITIONER.

HILL, FARRER & BURRILL,
M. B. JACKSON,
KYLE D. BROWN,
411 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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I.
JURISDICTIONAL STATEMENT.

This matter is before this Court upon the Petition of Tonkin Corporation of California, dba Seven-Up Bottling Company of Sacramento (herein referred to simply as "Employer", or "Petitioner"), for review of a Supplemental Decision and Order of the National Labor Relations Board (herein referred to simply as "Board" or "Respondent"), pursuant to Section 10(f) of the National Labor Relations Act (herein referred to simply as the "Act") as amended (61 Stat. 136; 73 Stat. 519; 29 U.S.C. Section 51 *et seq.*)[1]. The Board's

[1]The pertinent statutory provisions of the Act are reproduced in Appendix A, *infra.*

Supplemental Decision and Order [R. 81-86][2] issued against the Petitioner on 27 May, 1966, and is reported at 158 NLRB No. 110.

The Board's jurisdiction in the premises is not disputed by Petitioner. This Court has jurisdiction pursuant to Section 10(f) of the Act, in that Petitioner is engaged in business in the State of California within the Ninth Judicial Circuit and the unfair labor practices set forth in the complaint of Respondent's General Counsel allegedly occurred within the territorial boundaries of the Ninth Judicial Circuit.

II.
THE FACTS.

Upon charges filed by one Edward J. Farrell, ostensibly on behalf of the Sacramento Seven-Up Employee's Union (herein called simply "Union" or "Independent Union") [GCX1(a) and 1(c); R. 3-4], the Board, on 10 June, 1964, entered its Decision and Order adopting the finding of its Trial Examiner that Petitioner had violated Section 8(a)(1), (2) and (3) of the Act [R. 71-2]. The gravamen of the Board's original Decision was that the Petitioner had "locked-out" its employees to force immediate acceptance of contract terms by the incumbent Independent Union and used the contract gained thereby to prevent a rival Teamster's union from petitioning for representation. The Petitioner, according to the Board, had

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[2]References to transcript "Volume I, Pleadings" will be indicated herein by "R"; references to "Volume II, Transcript of Record", by "Tr". The designations "GCX" and "RX" will be used to designate, respectively, exhibits presented by the Board's General Counsel and this Petitioner, who was designated "Respondent" in the original proceedings.

therefore, unlawfully interfered with the *administration* of the Independent Union in violation of Section 8 (a)(1)(2) and (3) of the Act [R. 23]. Thereafter, on November 10, 1965, this Court issued its decision, reported at 352 F. 2d 509, enforcing the order of the Board only insofar as it related to the reinstatement and compensation of an employee, Barwise, but remanding the issues involved in the remaining "lock-out" portions of the order to the Board for further consideration, and such proceedings as the Board might deem appropriate, in light of the decision of the United States Supreme Court in *American Ship Building Co. v. NLRB,* 380 U.S. 300, rendered subsequent to the date of the Board's original Decision and Order. This action was taken even though this Court had on June 7, 1965, previously denied the Board's request that the case be remanded to it for reconsideration in view of *American Ship.*

On May 27, 1966, the Board issued its Supplemental Decision and Order, reported at 158 NLRB No. 110 [R. 81-86]. Not only did the Board adhere to its original decision that the Petitioner's conduct unlawfully interfered with the Independent Union's administration but it also found that the so-called "lock-out" was motivated by purposes violative of Sections 8(a) (1) and (3) [R. 85-86]. These alleged violations stem from events occurring during contract negotiations conducted in the spring of 1963 between Petitioner and the Independent Union.

In this connection, the Board made findings expressly predicated upon what it terms the "essential facts" in the case [R. 82]; in reality, as Petitioner

will demonstrate, these "facts" are either not supported by substantial, credible evidence in the record or constitute isolated incidents lifted out of context. In approaching a fair consideration of the issues here presented it is believed essential to detail rather completely and in chronological fashion the events upon which this action is founded.

A. Petitioner's Business and Organization.

Petitioner is engaged in business as a bottler and distributor of soft drink products, the principal one being "Seven-Up", in the City of Sacramento and surrounding areas. Since April 4, 1962, the Company has been directed by Harry Tonkin as President and Millard Tonkin as Vice-President and General Manager [Tr. 241-42; 290-91].

Immediately beneath the Tonkins organizationally, and directly responsible to them, is a Sales Manager who directs and supervises a Sales Department, which is normally comprised of three supervisors and twelve route salesmen [Tr. 197-98; 242-43; 291].

Petitioner also employs four or five people in the plant area to perform work on the production line, in the plant yard and for general maintenance. In the spring of 1963, approximately twenty persons were in the employ of Petitioner, twelve of whom were route salesmen and four or five of whom were plant and production employees [Tr. 67]. With the exception of the route supervisors and plant clerical help all of Petitioner's employees, including plant employees and route salesmen were members of the Independent Union [GCX 2].

B. The Independent Union.

The Independent Union had actively represented Petitioner's employees for many years before ownership of Seven-Up was acquired by the Tonkins [Tr. 353; 403]. In its capacity as collective bargaining agent, the Independent had annually negotiated collective bargaining agreements with Petitioner. The contract in effect when the Tonkins assumed control had been arrived at by bargaining between the Independent's negotiating committee and L. G. Stellings, the former owner of Petitioner. It provided, among other things, for a 12½ cent per hour raise and extended for a term of one year from 1 April, 1962 [Tr. 410-411].

From the outset the Independent had shown itself to be a viable organization. It had, for example, retained and paid for its own legal counsel in connection with its incorporation and the drafting of by-laws [Tr. 409-411]. Moreover, it maintained a separate bank account for the deposit of Union funds, separate membership records and minutes of meetings [Tr. 409-10].

Union funds were used to pay for legal counsel, to purchase membership cards and to pay for stationery, postage and other administrative expenses [Tr. 414; 418]. With the exception of the meeting held on 29 March, 1963, detailed below, meetings were always held at locations arranged and paid for by the Union [Tr. 412].

During the year 1962 the Independent held approximately four or five meetings relating to contract negotiations for that year, election of officers, incorpora-

tion, processing of grievances and other matters [Tr. 422; 410; 413; 415].[3]

No evidence whatever was adduced indicating that Petitioner, at any time, participated in or furnished any assistance or services in connection with Union affairs.[4]

C. Initial 1963 Contract Negotiations.

In January of 1963 James Elder, who had previously worked as a mechanic and forklift driver in the plant was assigned to a position in Petitioner's Vendor Department [Tr. 116; 119]. Elder at that time was the President of the Independent Union, having been first elected to that position in November of 1961 [Tr. 403]. As a consequence of his assumption of different duties, Elder relinquished his post and resigned as a member of the Union [Tr. 125-26; 85-86; 11; 403-04].

Thereafter, the Union, on about 15 February, 1963, called a meeting at the American Legion Hall in Sacramento for the purpose of electing new officers [Tr.

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[3]These facts, together with the recital below concerning the numerous meetings held in early 1963 regarding contract negotiations refute the Board's contention that, "Meetings of the Union have been irregular and infrequent and largely social." [R. 82].

[4]In this connection, compare the Trial Examiner's statement in an opinion adopted by the Board [R. 71-72] that, "There exists in this record no evidence that before the events of late March or early April [1963], the Respondent did anything which might be characterized as assistance to or domination of the Union within the Act's meaning," [R. 21] with the Board's wholly contradictory subsequent statement in its Supplemental Decision, that this Petitioner locked out its employees ". . . for the purpose of *keeping* the incumbent Union subservient to it as a bargaining representative . . ." [R. 85]. (Emphasis added).

10; 12; 85]. The membership elected Howard Hill, President, and William Barwise, Secretary-Treasurer [Tr. 10-11; 85]. Both of these men were route salesmen.

About one week later another meeting of the entire membership of the Union was held at Burich's Grill in Sacramento at which time the Union elected a Board of Governors comprised of Bernal Williams, Donald Olson, and Richard Howell, all route drivers, and a fourth member, Roy Fletcher, from the plant crew [Tr. 12-13; RX 1]. The meeting then turned to the discussion and formulation of specific proposals to management for the 1963 contract, as the current contract was due to expire on 31 March, 1963 [Tr. 12-13; 252]. A series of demands were agreed upon, typed up and presented to management a short time later in the form of a document entitled "7 Up Employees Union Requests for 1963 Contract" [Tr. 13-14; RX 1]. These requests encompassed a broad range of subjects, including wages, hours, overtime pay, health and welfare, sick leave, holidays, seniority and retirement [RX 1].

Over the period of the next several weeks the Union Negotiating Committee, consisting of its officers and the Board of Governors, met with the Tonkins several times in a mutual attempt to reach accord on a new agreement [Tr. 13-18; 87-88; 245-53; 293-94].

D. The Events of 29 March 1963.

(1) Management Addresses the Employees.

Because the termination date of the present contract was fast approaching and no agreement had yet been reached, the Tonkins felt that the progress of negotiations might be assisted if they were to address the employees and attempt to explain personally the

terms of management's offer and the reasons underlying its position [Tr. 254]. Accordingly the Tonkins arranged for a hall at Alhambra and "N" Streets in Sacramento and posted a notice on the plant bulletin board that a meeting of employees would be held there following work on Friday, 29 March, 1963 at 5:00 P.M. [Tr. 19; 254]. All of the driver salesmen and plant employees attended; only the Tonkins were present representing management [Tr. 19; 89; 324-25].

The meeting was opened by Harry Tonkin who outlined the terms of the Company's offer [Tr. 20; 255]. He stated that because the business had only recently been acquired and its financial situation was not yet sufficiently strong, it was not possible to do as much as they might like [Tr. 255-7]. Nonetheless, the Company was prepared to offer employees a raise of $3.00 a week the first year and $3.00 the second year. Tonkin also indicated that the Company would accede to the Union's demand that it pay the plant and production employees time and one-half for overtime [Tr. 255; 22; 295-6].

In response to questions raised from the floor the parties then variously turned to a discussion of subjects such as the bonus arrangement, sick leave, paid holidays and vacations, as well as scale in other industries [Tr. 255-8; 21-2; 160; 295-6]. For his part, Harry Tonkin agreed to reconsider the basis for computing the route salesmen's bonus (which was, for route salesmen, the counterpart of overtime compensation for the plant and production employees), in an attempt to improve the system [Tr. 256-57]. In re-

sponse to questions regarding wage scales in other industries, Tonkin observed that in his view such wage scales were not relevant to the soft drink industry; however, he went on to say that the Company was willing to meet the wage rates paid by other local soft drink companies even if the rate exceeded the amount of Petitioner's offered increase [Tr. 259; 334; 340].

Both of the Tonkins emphasized that relations between the Company and the Independent Union had always been cordial, that management was trying its best to be fair in dealing with the Union's proposals and that they sincerely hoped the Union would accept their offer so that matters would be straightened out before the present contract terminated on Monday morning [Tr. 255-60; 296-97]. In this connection, Harry Tonkin noted that the Company had instituted a new health and disability insurance plan under which they had considerably bettered their obligation to employees under the existing collective bargaining agreement and he hoped that they would take this as an indication of management's attitude in continuing to improve conditions as it was able [Tr. 256]. According to employee Barwise, Tonkin stated that he knew the men had been contacted by the Teamsters Union and emphatically stated that he did not want to negotiate with that Union.[5] For his part, Tonkin freely con-

[5]The Board leans heavily on this statement attributed to Tonkin by Barwise [Tr. 21], in support of its subsequent finding of unlawful motivation for the "lock-out" [R. 82; 85]. But, as we shall see, this remark was perfectly proper, for it would have been *illegal* for Petitioner to have recognized or dealt with the Teamsters during the period in question.

ceded that the subject of the Teamsters Union was mentioned during his discussion that evening. Tonkin did state that he had heard reports of teamsters activities among the men.[6] It was the Company's position that it was obligated to deal with the Independent Union which it had recognized for many years and which, to its knowledge, represented a majority of employees. Further, Tonkin pointed out that dealing through the Independent Union presented certain advantages over membership in a union such as Teamsters since the membership might then well become involved in the consequences of disputes not their own [Tr. 271-3; 161].

Following this, Millard Tonkin briefly addressed the meeting, expressing his accord with the views of Harry Tonkin and reiterating that management was attempting to do everything possible to satisfy the employee's demands and that the Tonkins wanted to have a happy group of employees so that the business would be run amicably and productively [Tr. 257; 296-97].

With the exception of a single witness[7] no testimony was given attributing to either of the Tonkins in their remarks in this occasion, any ultimatum re-

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[6]The "reports" alluded to by Tonkin were evidently mistaken, for no contact was had with the Teamsters until the following Sunday when Barwise and Hill met with representative Youman [Tr. 26-7].

[7]Witness Donald Olson testified that Harry Tonkin stated, "Now, those who want to go to work Monday, we have to have the contract signed tonight, . . ." [Tr. 160]. However, this testimony was not corroborated by a single employee who had been present at that meeting, including Barwise and Hill, the General Counsel's principal witnesses. Indeed, although Barwise testified that Harry Tonkin referred to the Teamsters [Tr. 20-21], he makes no mention of any such ultimatum.

garding the new contract, any assertion that it "had to be signed or else", or that any employee would be discharged or prevented from working if the contract were not signed. On the contrary, although it is evident that the Tonkins desired that their offer be accepted and an agreement reached, they left the decision on this point in the hands of the employees.

(2) The Union Meeting of 29 March, 1963.

After the Tonkins had completed their remarks, the Union's President, Howard Hill, suggested to Harry Tonkin that since the membership was already assembled, they could discuss the Tonkins' offer among themselves and ascertain whether agreement might not be reached at that time [Tr. 23; 90; 259-60]. Hill asked whether the Union might use the hall to conduct a private meeting, to which the Tonkins consented, and further stated that the Union's officers would contact them later at the plant office to communicate the results of the meeting [Tr. 23; 90; 260]. Accordingly, the Tonkins left the meeting hall and proceeded to their office to await the subsequent conference with Union officials [Tr. 260].

In the meantime, the Union's membership began a discussion of the Company's offer. It was obvious from the outset that the plant employees wanted to accept the contract the Tonkins had offered because their demand for overtime pay had been met [Tr. 23; RX 1]. However, there appeared to be some disagreement on the part of the route salesmen. No formal vote was taken by the employees mainly because the plant workers, who were satisfied with the proposed

pact, began leaving the meeting [Tr. 24]. After some initial reservation it was the consensus of the route drivers that they, too, would accept the Petitioner's offer, with the proviso that if a higher rate were paid in the industry, Petitioner would match it. Thereupon the Union's officers and Negotiating Committee were authorized to communicate this to the Tonkins and, if accepted, to agree upon a contract [Tr. 23-5; 83; 90; 340; 334; 350-1; 178].

Since Harry Tonkin had already indicated management's willingness to match whatever was paid in the industry [Tr. 259], it was the general understanding of the men when the meeting ended that things were settled, the terms agreed to, and that a contract would be signed as a matter of course on Monday morning [Tr. 83; 100; 334; 340; 350-1].

(3) The Subsequent Meeting at Petitioner's Office.

That same evening, at the conclusion of the Union's meeting, the Union's Negotiating Committee and officers proceeded to Petitioner's office and communicated the decision of the membership to the Tonkins. Those present representing the Union included Howard Hill, William Barwise, Bernal Williams and Donald Olson [Tr. 260]. These men reported to the Tonkins that the membership had agreed to accept their wage offer and their proposal to pay time and one-half to plant employees if management would agree to match any further increase paid generally in the industry. To this the Tonkins agreed, and they volunteered to ascertain that night whether there had been any developments at Pepsi-Cola in this respect, as that company was also

engaged in negotiations [Tr. 25-6; 100-02; 178-183; 260-4; 297-9].

After this initial agreement the parties turned to a discussion of additional points concerning paid holidays and sick leave. With regard to holidays, management agreed to the Union's demand that an employee's birthday be an additional paid holiday, and this was accepted without the necessity of its being incorporated in the contract [Tr. 108-9; 261]. The Tonkins further agreed to compensate employees for time-off due to sickness on a case-by-case basis, their one reservation being that by incorporating it in the contract as a fixed amount of annual time, they feared that abuses would result. The men were assured, however, that no-one who lost time from work as a result of actual sickness would be docked. This point was likewise accepted [Tr. 25-6; 100-02; 83; 178-83; 260-4; 297-9].

Additionally the matter of the route salesman's bonus was brought up and management agreed to look into the matter of the bonus and to improve upon the method of its computation, which was, in fact, later done.[8]

On the subject of the health and disability program, management pointed out that it had already instituted a change in the present plan under which it contributed far more than the fifty percent required of it under

[8]This point is corroborated by the General Counsel's witness, Hill: "Well, there is a—that bonus thing is a nightmare, they said they would work on it and do the very best they could, and they did. They did make changes in it, which was to the benefit of the employees, and that they also in the near future, if this one plan didn't work out, that they would be glad and willing to try another plan. In other words, an incentive program that would help the employees, they were willing to go along on one and work it out." [Tr. 109; 262].

the existing collective bargaining agreement, but stated that it would attempt to improve further on this plan as it was able. In addition, the Tonkins agreed to consider a pension plan, but pointed out that Petitioner was not yet financially able to qualify for one [Tr. 25-6; 83; 100-02; 109; 178-83; 260-4; 297-9].

The Negotiating Committee expressed its satisfaction with management's position on these points, and everyone shook hands on the agreement. The meeting closed in an atmosphere of cordiality and it was the impression of virtually everyone present and who testified that agreement had been reached. The officers stated that the agreement would have to be submitted to the men for ratification but since all of the demands had been satisfactorily resolved, it was assumed that ratification would be a mere formality [Tr. 297-9; 183; 25].

E. The Independent's Officers Meet With Teamsters on 31 March 1963 and Begin Solicitation of Members.

The following Sunday, 31 March 1963, Hill and Barwise, the Independent's President and Secretary-Treasurer, respectively, together with Bernal Williams, a member of the Board of Governors, attended a meeting at the home of a Pepsi-Cola employee at which there was present a local Teamster Union representative, one Youman [Tr. 26-7]. It is undisputed that this was the *first* employee contact with the Teamsters [Tr. 27]. During this meeting Barwise was handed a book of authorization card forms and signed one himself [Tr. 26-27]. Following this, Barwise and Wil-

liams called on various of Petitioner's route salesmen for the purpose of soliciting their signatures on Teamster authorization cards [Tr. 28; 335-36; 341-2]. Signatures were obtained from some of the men and were refused by others [Tr. 28; 335-6; 341-2].

It is important to appreciate the timing and significance of this activity. Here are the principal officers of the Independent Union who, having represented it in negotiations with Petitioner and having reached agreement with Petitioner's management pursuant to the express direction of the membership, and having shaken hands on that agreement, *subsequently* set about soliciting authorizations from their own membership on behalf of *another union.* Evidently it did not occur to these men nor, obviously did the point impress itself upon the Board, that this conduct was in violation of the membership's mandate, in derogation and repudiation of the agreement reached with Petitioner pursuant to that mandate, as well as being in flagrant conflict with the fiduciary obligations of these men, as officers of the Independent Union, to the membership which they represented.[9] We shall return to this point at some length below in discussing whether it was not in fact the *Union's officers* and *the Teamsters Union* who combined to "frustrate the process of collective bargaining" rather than Petitioner, as found by the Board in its Supplemental Decision [R. 85].

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[9]It is also apparent that Petitioner was unaware of this solicitation activity on behalf of the Teamsters until Barwise so stated, on Monday, 1 April, *after* the new contract with the Independent Union had been signed [Tr. 36].

F. The Events of Monday Morning, 1 April, 1963.

Since the Union's officers had expressed the wish to submit the agreement for the formal ratification of the membership on Monday morning before beginning work, Petitioner's management that morning left the lock on the gate of the parking lot enclosure across the street from the plant, where its trucks were kept[10] [Tr. 184; 264; 285; 300].

There was absolutely no intention on the part of Petitioner's management to lock its employees out of the plant premises or prevent them from working. The truck gate remained closed for the sole purpose of insuring that early starters would not leave on their routes without being notified of the meeting [Tr. 264-6; 300]. Indeed, the plant itself was open and unlocked as usual [Tr. 300; 345; 265; 68; 345].

It became apparent to the Tonkins as the morning wore on that matters were not finally settled as they had supposed [Tr. 264]. Accordingly, a meeting was held with the Union officers and the membership in the plant office in an attempt to ascertain just what the situation was. The Tonkins were advised by Hill, the Independent's President, that the matter of the new contract had been put to a vote in a meeting of men

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[10]The testimony of the General Counsel's principal witness, Barwise, is specific on this point: "Q. Did you arrive that Monday morning about the normal time? A. About the normal time, yes. Q. And had a union meeting been scheduled that morning before starting work? A. Yes, it was supposed to have been scheduled. Q. Was that set up the preceding Friday? A. The preceding Friday we—we had told them we were going to have a union meeting. Well, at that particular Friday night we were going to have a meeting with the members before anything was done. Q. Before work that Monday morning? A. Before work that Monday morning." [Tr. 69].

held by the truck gate and the offer had been rejected by a vote of 9 to 8 [Tr. 31; 266]. The Tonkins expressed their surprise and dismay at this turn of events, stating that they had relied in good faith on the Negotiating Committee's representations, had shaken hands with Union representatives on a contract the preceding Friday night, and believed the vote of the membership that morning was a mere formality. They added that they were keeping their part of the bargain and hoped and expected that the Union would keep its and that they could rely upon the integrity of the Union's own officers [Tr. 64-6; 285; 299-300].

There is some confusion in the testimony as to what followed this meeting. Evidently the membership withdrew from the plant premises and again discussed the matter across the street. It appears that a second vote was taken which resulted in an identical 9 to 8 vote against the contract [Tr. 33; 266]. At some time during the morning, Barwise solicited additional Teamster authorizations and transmitted them to a Teamster representative who was parked in his automobile down the street from the plant [Tr. 279-80; 28-29].

The membership again returned to the Tonkins' office to report the fact that they were unable to come to a conclusion. During this second meeting, the Tonkins advised the Union's officers that they had, in the interim, contacted their legal counsel and had been advised that the oral agreement reached the preceding Friday was binding and they hoped the Union would honor it. Under these circumstances, Tonkin stated that he felt the Union was obligated to adhere to its bargain and formally execute the agreement. There

was some further discussion concerning the fairness of the terms offered and agreed to and the suggestion was made that the membership discuss it further [Tr. 33; 266-70; 299-300].

Once again, the membership retired from the plant premises to discuss the matter across the street. There is again no specific testimony concerning the substance of this meeting but apparently a consensus was reached, for in a short time the officers returned to the plant and executed the agreement they had shaken hands on the preceding Friday [Tr. 34-5; 270; 299-300].

A number of employees, including Huleva, Kaderly, Jensen and Fletcher, testified that they were completely puzzled by the confusion and delay on that morning since they, like the Tonkins, had assumed matters to have been satisfactorily settled the preceding Friday and were at a loss to understand the position of the Union officers on Monday morning [Tr. 337-8; 340; 342-4; 347; 351-2].

At the time of the execution of the agreement, Barwise volunteered the fact that he had been active among the Independent's membership on behalf of the Teamsters, and he queried Petitioner's management as to whether any reprisals would be taken because of this. This was the first notice which the Tonkins received concerning the fact of Teamsters contacts on behalf of its employees. Both Tonkins emphasized that there would be no discrimination against any employee as the consequence of any Union activity. They stated that in their view, matters had been amicably settled, by-gones were by-gones, there would be no hard feel-

ings in any quarter, and that everyone would resume work on the same basis as before [Tr. 35-6; 270-1; 299-300].

G. Receipt of Teamster's Petition.

The following day, 2 April, 1963, the Teamsters filed with the Board's Regional Office a Petition for a Representation Election among the Petitioner's employees [GCX 3A; Tr. 7]. On 5 April, 1963, Petitioner and the Independent Union each received letters from the Regional Director enclosing copies of this Petition, numbered 20-RC-5409 [Tr. 37; 303; 110; 316; RX 2]. Both letters were sent by registered mail, and the letter intended for the Independent Union bore Petitioner's address, 3310 "P" Street, Sacramento [RX 2]. The letter addressed to the Independent was picked up by Howard Hill in the plant office when he returned from his route that day [Tr. 316]. Upon opening and reading the letter, Hill asked Millard Tonkin, who was seated in the adjoining office, whether the Company had received a similar letter [Tr. 316-17]. At some point in the ensuing conversation William Barwise joined the group so that the persons present were Barwise, Hill and the Tonkins [Tr. 37; 317-18; 110].

All recalled that the conversation centered around the request in the Board's letter that copies of the Independent's contract with Petitioner be forwarded to the Regional Director, and Hill volunteered that the Union had no facilities for reproducing copies of the contract [Tr. 38; 318]. The Tonkins indicated that they could have this done if the men so desired, since they

intended to duplicate their own copies and mail them in response to the request [Tr. 316-20]. Hill and Barwise replied that they would check with their attorney and call the Tonkins back regarding this point [Tr. 316-20; 37-8].

On Saturday morning Hill telephoned Millard Tonkin at Petitioner's office [Tr. 39-40]. In the interim, he and Barwise had checked not with the attorney for the Independent Union, but rather with Woody Youman, a representative of the Teamsters. Youman had indicated to them that regardless of whether copies of the contract were sent to the Board, the Teamsters would have a hearing in the matter [Tr. 39]. Hill told Millard Tonkin that as far as the Union's officers were concerned, the Tonkins could send the contract in or not as they desired and that it was up to their discretion [Tr. 111; 39; 318].

Obviously, he and Barwise were aware of the fact that the Union, of which they were President and Secretary-Treasurer respectively, would be put in the position of appearing to disclaim any interest in the membership they represented or the contract to which it was a party, so far as proceedings on the Teamsters' petition were concerned, if the requested documentation were not furnished. Thus, it now seems apparent that although they were reluctant to have the contract sent in, they did not want to seem to be refusing to do so because of the implications this latter course would obviously carry. This, of course, fully explains Hill's decision to reply in ambiguous fashion, stating to management that it could do as it pleased [Tr. 111; 318].

On the other hand, Millard Tonkin's interpretation of this statement was entirely reasonable. He assumed that the Independent's officers desired to act responsibly and to notify the Board of its interest in the pending representation proceedings. Accordingly, at the time he sent in copies of the contract in reply to the letter addressed to Petitioner, he also addressed a letter giving the Union's return address and enclosed copies of the same contract in response to the letter addressed to it [Tr. 318-320].

This incident will be discussed again below in connection with Petitioner's contention that the activities of the *Teamsters Union* and *The Independent's officers* "rendered the incumbent Union incapable of effective and responsible representation", as found by the Board [R. 85].

H. Receipt of Original and Amended Charges.

The original Unfair Labor Practice Charge herein, dated 5 April, 1963, was received by Petitioner on Monday, 8 April, 1963 [Tr. 287; R. 3]. The Charge was filed on behalf of the Independent Union and alleged violations of Sections 8 (a)(1), (2) and (5) in that the Petitioner had purportedly dominated and interfered with the *Independent Union* and had *refused to bargain collectively with it or its representatives.* The Charge was signed and filed by one Edward J. Farrell, a person whose identity and relationship to the situation were completely unknown to the Tonkins. It was brought out at the hearing on this matter that Farrell actually was the attorney for the Independent Union, although this fact was not known to the Ton-

kins as late as 24 April, 1963 [Tr. 48; 97; 281-2; 320-1]. Significantly, then, as this Charge was initiated by the Independent Union, not the Teamsters, and claimed a refusal to bargain with it as the representative of a majority of Petitioner's employees, it contravened and disputed the claim of the Teamsters in this respect as evidenced by their Petition for an Election filed the preceding Tuesday [GCX 3A; Tr. 6].

Approximately three months later, Petitioner received a copy of the First Amended Charge, dated 29 May, 1963 [GCX 1c; R. 4]. Significantly the "refusal to bargain" allegations were dropped from this document, although allegations were added concerning alleged discriminatory discharges of employees Barwise and Olson.

III.
THE BOARD'S FINDINGS.

A. Original Decision and Order.

The Board's original Decision and Order adopted the decision of its Trial Examiner in its entirety [R. 71-72], thus affirming the following findings:

(1) Section 8(a)(1) Violation (Employee Rights).

Petitioner was found to have violated Section 8 (a)(1) of the Act for having discharged employee Barwise on account of his union or other protected activities on behalf of the Teamsters and for having "locked-out" its employees on 1 April, 1963, allegedly in order to force signing of the contract [R. 23]. The allegations that employee Olson was discriminatorily discharged were dismissed [R. 21; 71].

(2) Section 8(a)(2) Violations (Interference).

No evidence of any unlawful domination, assistance to or interference with the administration of the Independent Union was found prior to the events of late March and early April 1963. Indeed, the Board found no evidence of unlawful domination or assistance of the Independent Union at all.[11] Petitioner was, however, found guilty of unlawfully interfering *in the administration* of the Independent Union by "forcing it" to agree to a contract on 1 April, 1963, by engaging in a so-called "lock-out" [R. 22-3].

As a further element of this alleged violation, the Board found that Petitioner utilized the contract so obtained to bar the *subsequently asserted* Temasters' Petition and cites in this connection, Petitioner's conduct in forwarding to the Board, on behalf of the Union, a copy of the contract, as above described [R. 22-3].

(3) Section 8(a)(3) Violation (Discrimination).

The Board found that by its alleged unlawful discharge of employee Barwise and by its alleged unlawful "lock-out" of employees on 1 April, Petitioner violated Section 8(a)(3) of the Act. However, it absolved Petitioner of similar charges in the case of employee Olson [R. 21; 71].

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[11]In this connection the Trial Examiner further found that, "although in late March, the Respondent (Petitioner herein) was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that the Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could." [Tr. 21-2].

B. Supplemental Decision and Order.

Pursuant to the decision of this Court, in *NLRB v. Tonkin Corporation of California, etc.,* 352 F. 2d 509, issued on November 10, 1965, remanding the issues subsumed in the "lock-out" portions of the original Order to the Board for further consideration, in the light of *American Ship Building Co. v. NLRB,* 380 U.S. 300; the Board, without a further hearing, issued its Supplemental Decision and Order on May 27, 1967 [R. 81-6]. In this decision the Board came to the following conclusions:

(1) It adhered to its original decision that Petitioner "locked out" its employees to force acceptance of Petitioner's contract terms by the Independent Union and used this contract to obstruct the representation petition subsequently filed by the Teamsters, in violation of Section 8(a)(2) of the Act [R. 85].

(2) It found that Petitioner's "lock-out" was not protected by the *American Ship* decision, because Petitioner's use of this device was (a) "designed to destroy or frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees, and rendering the incumbent union incapable of effective and responsible representation;" and (b) "was also designed to encourage membership in the incumbent Union and discourage membership in the Teamsters." [R. 85]. Thus, it found the "lock-out" violated not only Section 8(a)(2) but also Section 8(a)(1) and (3) [Tr. 85].

IV.
PETITIONER'S POINTS AND ORDER OF ARGUMENT

Petitioner will demonstrate that the foregoing findings are not supported by substantial, credible evidence and that the so-called "lock-out", even if it be conceded as such, was a legitimate and lawful exercise of economic pressure by Petitioner brought to bear in support of its good faith bargaining position for the purpose of securing, not frustrating, agreement.

Petitioner will address itself initially to this Court's scope of review in weighing the evidence relied upon by the Board to support the above findings, emphasizing that the Court must view with caution the Board's total reliance upon isolated portions of the testimony of but a few of the numerous witnesses called by the General Counsel and its uniform disregard of the witnesses and evidence presented by Petitioner.

Next Petitioner will center its argument on the interference charge, including the "lock-out" issue. In this connection Petitioner will show that, despite the Board's contrary finding, oral agreement was reached on the terms of the contract and that Petitioner engaged in no "lock-out" as that term is traditionally defined, but rather, acted merely in compliance with the Union's request that a meeting be held to formally ratify that agreement.

Lastly, Petitioner will assume *arguendo* that a "lock-out" existed, but demonstrate that such activity is protected by the United States Supreme Court decision in *American Ship* and the Act itself. Here discussion will center on the Board's supplemental findings which will be seen, upon analysis, to have no substantial support in the record.

V.

APPLICABLE STANDARDS OF REVIEW.

The Board's Decision Cannot Be Sustained Unless It Is Supported by Substantial Credible Evidence. Moreover, as the Board Has Uniformly Credited Witnesses for the General Counsel and Discredited Those of Petitioner, It Becomes the Duty of This Court to Scrutinize All the More Closely the Findings Relied Upon to Support the Decision.

The Board's Supplemental Decision, even more so than the original, rests almost totally on the credit accorded to certain of the General Counsel's witnesses only, principally Hill and Barwise, and then only to certain portions of their testimony. On the other hand, testimony of the General Counsel's five other witnesses and of the witnesses called by Petitioner has been almost wholly disbelieved. Indeed, the critical testimony of four disinterested employees, called by Petitioner, has gone completely unremarked.

Under such circumstances the reviewing court, which is charged with the responsibility for assuring the reasonableness and fairness of the Board's decisions, is not restricted to a determination of whether there is any credible evidence in the record to support the Board's conclusion, but rather, is authorized to look at the record as a whole in order to determine whether the decision is supported by substantial credible evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951). In the performance of this function the reviewing court must take into account contrary evidence or evidence from

which conflicting inferences could be drawn, including evidence which fairly detracts from the weight of the evidence relied upon to support the decision [340 U.S. 487-488; *NLRB v. Isis Plumbing & Heating,* 322 F. 2d 913 (9th Cir. 1963)].

When the record discloses that the Board, or its Trial Examiner, has, in reaching its conclusion uniformly believed all of the General Counsel's witnesses and discredited those appearing for the Petitioner, the usual presumption in support of such findings will not be indulged, and the circumstance will be taken as some evidence of bias. In such situations, it becomes necessary to question more searchingly the inferences drawn from the evidence so credited and to consider all material contradictory evidence. *NLRB v. Miami Coca-Cola,* 222 F. 2d 341, 343 (5th Cir. 1955); *NLRB v. Florida Citrus,* 288 F. 2d 630, 636-7 (5th Cir. 1961); *NLRB v. United Brass Works,* 287 F. 2d 689, 691 (4th Cir. 1961); *NLRB v. Walton,* 286 F. 2d 16, 21 (5th Cir. 1961); *NLRB v. McGohey,* 233 F. 2d 406 (5th Cir. 1956).

Even beyond this, on the question of whether agreement was reached on the evening on Friday, 29 March, 1963, and in connection with the issue of the so-called "lock-out", even those plentiful aspects of the *General Counsel's* evidence which give support to the contentions of Petitioner have been ignored, as we point out below. Under these circumstances, Petitioner contends that the rule of the above cited cases is *a fortiori* applicable and that the Board's findings are not to be accorded their customary weight, but must, on the contrary, be viewed with caution.

VI.
ARGUMENT.

The Board's Finding That the Parties Failed to Reach Agreement on a Collective Bargaining Contract Is Not Supported by Substantial, Credible Evidence. On the Contrary, the Record Indicates That Petitioner Fulfilled Its Statutory Obligations by Recognizing the Independent Union and Bargaining Lawfully and Effectively to Agreement, and No More.

The Board, following its Trial Examiner's recommendation, initially concluded that no agreement was reached on the evening of Friday 29 March, 1963[12] [R. 22]. This was perhaps understandable in a certain sense, since the conclusion is fundamental to the Board's finding of unlawful conduct based on Petitioner's subsequent activities, as the decision impliedly concedes. For, if, in fact, agreement had been reached on the 29th, nothing in Petitioner's subsequent conduct could be so stigmatized. What is important, however, is the fact that the Board's conclusion flies in the face of uncontradicted evidence from all sides, including that given by several of the General Counsel's own strongest witnesses.

This same evidence indicates that the agreement so reached represented substantial concessions on the part of Petitioner's management, including: a two-step wage

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[12]The Board appears to retreat from this position in its Supplemental Decision, discarding this flat assertion in favor of the more equivocal statement that, "The Tonkin brothers offered to match any higher rate paid by the local Pepsi-Cola Bottling concern. The employees present expressed satisfaction with this point and the meeting broke up." [R. 83].

raise; agreement that any further increase in the local beverage industry's wage scale would be matched by Petitioner; granting of time and one-half for overtime; oral concessions on the issue of paid holidays; oral concessions on the issue of sick leave; agreement that the driver-salesman bonus system would be reexamined and reorganized on a more favorable basis (which it was), and agreement to consider the establishment of an employee pension plan and to boost the Company's contribution to health and welfare plan as soon as Petitioner was financially able.

Moreover, many of these points were conceded at the final stage of negotiations—certainly the best evidence of genuine give and take in the bargaining. This, of course, demonstrates the effective power of the Independent and is quite inconsistent with the Board's suggestion that the Independent was a weak and subservient organization. The concessions won clearly evidence the fact that good faith bargaining had taken place, even though the Board's original and supplemental decisions make no reference to it. Indeed, the Board concedes the effectiveness of the representation of the Independent by its affirmative finding that Petitioner was not guilty of any assistance to or domination of the Union before the events of 29 March—1 April [R. 21]. From Petitioner's standpoint, then, it was dealing with the freely chosen representative of a majority of its employees, a representative which Petitioner had been obligated to recognize and deal with for several years. Moreover, as will be pointed out in greater detail below, Petitioner would have been

guilty of an unlawful refusal to bargain had it not recognized the Independent.

There is really no dispute in the testimony that the extended negotiations previously detailed culminated in agreement on the evening of 29 March, 1963. This fact is of vital importance, for when established, it wipes out the base premise of the reasoning which supports the Board's conclusion. Therefore, a review of the record is appropriate to demonstrate just how firmly it was established.

The starting point regarding the agreement reached on 29 March was Harry Tonkin's address to employees that evening, in which he offered the concession of paying time and one-half for overtime to the plant and production employees and further volunteered a two-step wage raise of $3.00 each year, and in addition to the offered raise agreed to match any further increase paid by the local soft drink industry [Tr. 255-60; 295-6].

Following Tonkin's remarks, the Union membership held its own meeting at which a consensus developed, the gist of which was that the employees *authorized* their Negotiating Committee to accept Petitioner's offer on the condition that it would confirm its agreement to match any further raise given by the industry locally. In addition, the Committee was asked to discuss concessions regarding sick leave and paid holidays, but failure to reach agreement on these latter points was not to invalidate the membership's authorized acceptance of terms. Every rank-and-file

employee testifying at the hearing confirmed the fact that consensus was reached on this basis.[13]

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[13]The Board has, throughout this case, totally ignored the testimony of these disinterested witnesses to the effect that the membership instructed the Committee to accept the Tonkins' offer. James Huleva, a route salesman, described the Union meeting that evening:

> "Q. After the Tonkins had left, yes. A. Well, it was more or less agreed, the way I understood it—Q. Was there a discussion among the men there? A. Yes, there was. Q. And were most of the route salesmen there? A. I would say most of them. Some of the plant crew had left, but most of the men were there. Q. Then continue right on. What was said by whom? A. Well, it was more or less agreed at that time, it seemed like to me that we would go along with the agreement with the Tonkins, the way it was set up that we would sign the contract. Q. And was there some agreement or understanding among the men regarding or asking the Tonkins if they would match any increase of any other beverage company in the area? A. They said that they would, yes. Mr. Kintz: I think it is a conclusion as to the statements he made concerning the understanding among the men. The Witness: Well, the Tonkins said if there was any, if the other companies gave, if there was more money, they would match the money. Q. (By Mr. Jackson) Now, did the men, following this, ask the Negotiating Committee to convey this to the Tonkins? A. Yes they did." [Tr. 334-5].

This testimony was corroborated in every respect by that of Challas Jensen:

> "Q. Did you attend the meetings that took place on the 29th of March, Friday evening? A. Friday evening, yes, I was there. Q. Were you present at that meeting after the Tonkins left the meeting and the other employees met together there to decide on the matter of a contract offer? A. Yes. Q. And did you participate in the discussion about what to accept and so forth? A. Yes. Q. And what was your understanding concerning the general agreement among the men on that point at that time? A. Well, when we talked it all out, the way I understood, when I went home, that it was all settled that we would accept the Tonkins' offer and we were going to see if we couldn't get our birthday off, which we did, we were going to ask for our birthdays off or one paid holiday a year. I can't remember just how that was, which I understand was all accepted. Q. Was the point that Mr.

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Just as importantly the testimony of the Union's membership was fully corroborated by three of the

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Huleva mentioned regarding the Company's matching any other increase by Pepsi or anybody else in the local bottling industry a part of that general understanding? A. Yes, uh-huh. Q. And over the weekend Mr.—oh, withdraw that. And then were some members of the group there authorized to convey this decision to the Tonkins? A. Yes, I don't remember this for sure who went over. I think there were two of them went over at the plant to tell the Tonkins that we accepted." [Tr. 340-1].

The third of these witnesses, Roy Fletcher, testified in identical fashion:

"Q. On the 29th of March. And directing your attention to the time after the Tonkins left the meeting, were you present at the discussion among the employees there about the contract which followed their departure? A. I was there for awhile. I left before everybody else did. Q. In other words, you weren't the last to leave? A. No, I wasn't the last. Q. But you were there for awhile. Will you describe in your own words—withdraw that. Did you take part in the discussion that they described about whether to accept the contract terms or not? A. Yes, sir. Q. Now, will you describe in your own words just what occurred then and what was said by whom and so forth as best you remember it? Again if you can't remember the exact words, just tell us the substance of what was said. A. Well, I just—like the gentleman said, I figured that the contract was settled that—what I mean, that we were going to match whatever the other bottler companies what any of the companies were going to give and—Q. And—A. I figured everything was settled, we were going to go back Monday morning to work. Q. And was there something said about asking the Tonkins that evening to add birthdays as a paid holiday? A. We would like to have one day paid, one day off. Q. Was anything discussed about sick leave at this time, if you recall? A. I think something was brought up. I don't know if anything was really decided on. Q. And did the group there authorize some of the members to go to the Tonkins and communicate this decision to them? A. Well, before the, I had what I thought was settled that we were going to —that the contract, you know, was going to be signed, everything else, I was in a hurry to get home, because I had something important to do, so I left. Q. Well, when you thought that matter was settled, you understood so far from the rest of the men there, you left? A. Yes, I figured it was all settled." [Tr. 350-1].

General Counsel's key witnesses, Olson, Hill and Williams.[14]

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[14]Donald Olson, one of the original complainants, testified as follows:

> "Q. And following this meeting on Friday evening there, do you recall—I am talking about the meeting of the men that took place after the Tonkins had left the Hall? A. Yes. Q. Do you recall there being some discussion about, among the drivers there about being willing to go along with whatever the rest of the bottling industry paid? A. Yes. Q. And that was the sense, or the decision that was communicated to the Tonkins at the Seven-Up office later that evening, wasn't it? A. Yes. Q. In addition to the points that were mentioned on the sick leave? A. Yes. Q. And was there a point brought up also about another paid holiday? A. Yes." [Tr. 178].

Olson went on to specifically confirm that the Tonkins at the same meeting, agreed to all of the points and conditions specified by the Negotiating Committee:

> "Q. And when you came over to the office later that night, then the union stated its position as to what they wanted, isn't that correct, after the meeting? A. Yes. We stated what we wanted, yes. Q. And actually at that meeting at the office they agreed to go along with just about all the points you specified, didn't they? A. Yes." [Tr. 183].

Howard Hill, the Union's President, and one of the General Counsel's principal witnesses, testified candidly:

> "Q. Would you describe it in your own words to us just as it took place there? A. I tried to keep the fellows there to have this vote, and two or three of the plant fellows well, one of them this wife was outside in the car, so he walked out, another walked out, we tried to hold them together, we could only keep about two of the plant men and the rest of the drivers. We started talking about the proposals offered by management, and what our alternatives were. Well, we didn't get to take an actual vote at that meeting. We tried to, but we didn't get to it, but we came to an oral understanding agreement with the fellows that what the industry would offer, we would accept in the same vein, and that's when the group of us went down to the office afterwards. Q. And it was that understanding that you reported to the Tonkins when you met with them at the office later? A. Right. A. Now, as I understand it, at that meeting there at the office, you said that it had been agreed that they would go along with what the industry paid, and there were these

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Even the General Counsel's star witness, Barwise, reluctantly concedes the fact that an agreement had been reached despite some attempt by him to evade the issue [Tr. 23-5; 61-3].

It cannot be seriously contended otherwise on this record, but that the membership unequivocally authorized its Negotiating Committee to accept Petitioner's offer that same Friday evening, subject to the proviso concerning the matching of any other increase in the industry plus, if possible, additional concessions on the issues on the issues of paid holidays and sick leave.

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one or two other remaining points that you wanted to agree with them at that time, one was the question of sick leave. A. Yes." [Tr. 99-100].

Bernal Williams, yet another of the General Counsel's witnesses, supplied further corroboration that a decision had been reached:

"Q. (By Mr. Jackson): Mr. Williams, on the Friday evening after the Tonkins had left and you were holding the Union meeting, I believe Mr. Barwise testified that the production employees indicated that they were happy and that most of them drifted away from the meeting? A. Yes, they walked out, yes. Q. And that the matter was discussed a little further among the drivers, salesmen, driver-salesmen who remained there and they more or less informally decided that they would accept what was being paid wholly in the bottling industry, is that correct? A. Whatever the industry would pay, however, they went, yes. Q. And then the group of you that Mr. Barwise described, went over to the Tonkins' office there at 7-Up and communicated this decision to them? A. We told them, yes. Q. And was there somebody, was there something said in the course of that meeting there at 7-Up about what Pepsi was offering and what the situation was at Pepsi, do you recall? A. Yes. When we told them we would go with the rest of the industry, the way the rest of the industry went, that it would be all right with us, and then Mr. Tonkin told me that he would find out what Pepsi was going to do and then he would phone me at a later date that evening, which he did." [Tr. 82-3].

The evidence is equally clear and equally without substantial dispute that the meeting between the Negotiating Committee and the Tonkins held later that same evening secured Petitioner's agreement on the main points, its concessions on the other two, and in addition, concessions in other areas (such as the bonus system), not even mentioned by the membership and beyond their mandate to the Negotiating Committee, and that agreement was concluded on that basis. That agreement in substance was reached, is the inescapable conclusion from all of the evidence concerning this event. Certainly there was no misunderstanding among the rank-and-file of the membership who believed that the matter had been concluded and were surprised, on the following Monday morning, to learn from their own officers that it apparently had not.[15]

The problems which developed on Monday morning were just as surprising to the Tonkins who were given the clear impression by the Negotiating Committee that an agreement had been concluded. As Millard Tonkin put it,

> "We had shaken the hands of the men and we looked at them and we were happy that they had reached the conclusion that they did, and it was our feeling when we left that there was a satisfactory agreement and it was a formality that Monday morning we were ready to go to work under the terms of the new contract." [Tr. 298].

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[15]See, in this connection, the testimony of Huleva [Tr. 337-8]; Jensen [Tr. 342-4]; Kaderly [Tr. 347] and Fletcher [Tr. 350-2].

Even Hill and Barwise were forced to admit the fact that the membership's conditions for contract acceptance were obtained.[16] Of course, this testimony was grudging at best, for the obvious reason that the fact of prior agreement throws an embarrassing light upon their own subsequent conduct, which can only be interpreted as a deliberate effort to frustrate the agreement on which they there shook hands.

The foregoing review of the evidence, it is submitted, establishes beyond any doubt that agreement was reached on Friday evening. It follows, therefore, that as the Board's contrary finding is not supported by substantial credible evidence in the record, it must be overturned. *Universal Camera Corp. supra.*

A. The Formality of Ratification, Insisted Upon by the Union's Officers, Was a Subterfuge to Avoid Execution of the Bargain Reached.

At the conclusion of the meeting between the Tonkins and the Negotiating Committee on Friday evening, it was understood that an agreement had been consummated subject only to the formal ratification of the membership on Monday morning. The subject of ratification was initiated by Hill who stated to the Tonkins that the Committee did not have the authority to execute the agreement without taking another vote of the membership[17] [Tr. 101-02].

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[16]See testimony of Barwise [Tr. 25-6; 61-7] and Hill [Tr. 100-02; 106-09].

[17]This statement did not jibe at all with the understanding of the rank-and-file employees, who uniformly testified that the committee had been authorized to enter an agreement if their terms were met, and believed matters had been settled

Such ratification was purportedly required by the Union's By-Laws [Tr. 100-02]. It now appears that the officers' insistence on this additional step stemmed not from their concern over compliance with Union procedures, but rather was a manifestation of their intention to repudiate the agreement reached and to frustrate the bargaining process. For over the intervening weekend, officers Hill, Barwise and Williams were approached by the Teamsters Union and began solicitation on its behalf among the Independent's membership in an effort to subvert this agreement. The bad faith which this activity evidences is, of course, attributable only to the Teamsters and the Independent's officers, not the membership, since the latter, despite some initial confusion, early evidenced its desire on Monday to stick with the Independent and the bargain it had made.

B. The Occurrences of 1 April, and the So-Called "Lock-Out."

Once it is understood that an agreement had been reached on Friday evening, the Board's finding that on Monday 1 April, "Respondent locked out its employees to force immediate acceptance of *Respondent's* new contract terms . . .", [R. 85] is seen to be without substance. Let us consider this so-called "lock-out". As indicated above, on Friday evening following their meeting at Petitioner's office, the Union's officers

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Friday without the necessity of any further steps being taken (See footnotes 13 and 15 *infra*). Moreover, there is no evidence that in the Union's meeting on Friday evening anything was said about a subsequent vote to formally ratify the agreement.

stated that they would meet with the membership before work on Monday for the purpose of taking a vote to ratify the agreement reached [Tr. 102; 182-3; 285; 299].

It was assumed by all that this would be a mere formality, but since notice might not have reached all of the employees over the weekend and there was a possibility that some of the route salesmen might set out on their routes before learning of the meeting, Petitioner kept the lock on the gate of the truck parking lot enclosure across the street from the plant on the early morning of 1 April. The plant itself was open and otherwise completely normal in this respect [Tr. 300-01; 265-6].

These, presumably, are the circumstances relied upon to establish the "illegal lock-out". Their mere recital, viewed in any reasonable light, reveals the absurdity of this charge. It seems quite clear that none of the employees themselves, other than the most interested of the complainants so viewed it [Tr. 344-5; 347; 351-2]. Certainly the traditional conception of a "lock out", as "the cessation by the employer of the furnishing of work to employees in an effort to obtain for the employer more desirable terms"[18] is not applicable to this situation. Petitioner had no intention of locking its truck gate for the purpose of bringing pressure to bear on employees to reach agreement: *it honestly believed that agreement had already been reached.* The locked gate was to insure attendance at the meeting

[18] *Re Associated General Contractors, Georgia Branch,* 138 NLRB 1432 (1962)

which Union officers themselves had called, in an attempt to expedite formalization of the contract.

The incidents which followed on that morning are consistent only with the sequence of events previously recited. As indicated, the Tonkins were understandably surprised and no little dismayed to find the Union's officers attempting to repudiate the agreement on which they had shaken hands two days earlier and evidently exhorting the membership to reject it. Under these circumstances, the Tonkins stressed their legitimate concern for assuring that the Union live up to the contract it had agreed to in precisely the same manner that it would demand and expect of Petitioner, nothing more.

During the various meetings held that morning, management was firm in insisting that the Union honor its bargain and execute the agreement.

Unquestionably, the Tonkins were entitled under the law to make just such a demand, for in order to avoid misunderstandings and to supply an accurate record upon which future negotiations can be based, the duty to "bargain collectively" imposed by the Act expressly contemplates the execution of a written contract if agreement on its terms is reached and either party requests the same.[19]

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[19]Section 8(d) of the Act defines "collective bargaining" as,

> ". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and *the execution of a written contract incorporating any agreement reached if requested by either party . . .*" (emphasis added)

Significantly, *none* of the rank-and-file employees were subpoenaed by the General Counsel to testify on this point. The reason is evident. Those of them who were called by Petitioner made it crystal clear that the membership, while somewhat confused at first by the tactics of their own officers on Monday morning, eventually saw through these and insisted on sticking by the terms of the contract agreed to. Execution of the contract only put a formal seal on the prior agreement and represented a "capitulation", not on the part of the Union or its membership, but on the part of the Union's officers and the Teamsters in their attempts to frustrate agreement.

Indeed, the officers of the Independent could not have lawfully acted otherwise. Under decisions of both the Courts and the Board, a refusal by the Union's officers to execute the subject agreement would have exposed the Independent Union to charges of refusal to bargain collectively with Petitioner in violation of Sections 8(b)(1) and (3) of the Act.[20]

And while it is purely an internal Union affair as to whether negotiators can execute an agreement on behalf of their Union or must submit the agreement reached to ratification of the membership, *NLRB v. Darlington Veneer Co.,* 236 F. 2d 85, 88 (4th Cir. 1956); *Allis Chalmers Mfg. Co. v. NLRB,* 213 F. 2d 374 (7th Cir. 1954), if a union, in bad faith, delays submission of a negotiated agreement so as to de-

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[20]See *Standard Oil Co. v. NLRB,* 322 F. 2d 40 (6th Cir. 1963); *NLRB v. Painters Union,* 334 F. 2d 729 (7th Cir. 1964); *Butchers Union Local 120, etc.,* 154 NLRB 16 (1965).

feat approval, or refuses to ratify an agreement for some extrinsic or unrelated reason, it is guilty of refusal to bargain.

Thus, in *Los Angeles Mailers Union No. 9, etc.*, 155 NLRB 684, 689 (1965) the Board's Trial Examiner made this pertinent observation:

> "It is commonly understood that a principal may authorize his agent to negotiate and make a collective-bargaining contract or he may limit the agent's authority to negotiating and recommending a collective-bargaining contract. If the agent's authority is so limited, normally a contract does not exist unless the principal approves the recommended agreement. Where past dealings have demonstrated that negotiators' recommendations carry considerable weight and are usually accepted in due course, it is readily understandable that the negotiators for both sides, and even the principals, would come to regard acceptance or ratification by the principal as a formality only; and a rejection by the principal in such a case might well be deemed an act of bad faith, especially in the absence of a bona fide reason for dissatisfaction with the substantive provisions of the negotiated terms of the contract."[21]

Here the reasons for the Independent Union's initial failure to ratify the agreement had no relationship to the substantive provisions of the negotiated contract. Even the Board concedes, as it must, that the Union's

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[21]See *H. J. Heinz Company v. NLRB,* 311 U.S. 514, 526, 61 S. Ct. 320, 85 L. Ed. 309 (1941). *Sheet Metal Workers Union, Local No. 65 AFL-CIO,* 120 NLRB 1678 (1958); *Operating Engineers Local Union No. 3,* 123 NLRB 922, 929 (1959).

refusal was motivated by the defection of its officers to the Teamsters Union [R. 83-84]. Therefore, the Union's refusal to reduce the contract to writing cannot be defended on any legitimate ground and the propriety of Petitioner's insistence on the same is clearly established.

The Board's findings in the instant case are pinned to certain basic factual assumptions and must stand or fall with them: (a) that no agreement was reached at any time; (b) that the Petitioner insisted on its contract or nothing at all, and (c) that this contract was eventually attained by allegedly illegal means. As we have seen, these findings are not supported by substantial evidence.

The Board has totally ignored the many concessions made by Petitioner, the agreement actually reached on the preceding Friday evening and the understanding of the membership in this respect. It completely sidesteps the significance of the activity engaged in by Hill, Barwise and Williams on Sunday by refusing to relate their Teamster contacts on that date to what took place the following Monday morning. However, the great weight of evidence disposes of these assumptions and the Board's findings fall with them.

Assuming, for the Sake of Argument, That Petitioner "Locked-Out" Its Employees, Such Activity Was Solely in Support of Its Legitimate Bargaining Position and Undertaken in Good Faith. Consequently, the "Lock-Out" Is Protected by the American Ship Decision of the United States Supreme Court.

Even if it is assumed, *arguendo,* that the leaving of the lock on the gate of the parking lot enclosure after the employees failed to ratify the agreement amounted to a "lock-out", there was nothing illegal or

unlawful about it, for it was patently nothing more than a legitimate exercise of economic pressure on the part of Petitioner in support of its bargaining position and as such, within the ambit of the United States Supreme Court's decision in *American Ship, supra.*

The Board has found that Petitioner's activities are not so protected because the "objects" of the "lockout" made it "the very antithesis of one solely in support of a legitimate bargaining position." [R. 85-86]. This conclusion has been reached principally by the technique of seizing upon *dicta* in *American Ship,* wrenching it out of context, and applying it in stigmatizing Petitioner's motives. We shall endeavor to analyze separately each of the findings on this issue in order to demonstrate that the Board has without exception reached untenable, insupportable conclusions.

A. The Board's Original Finding, Here Reaffirmed, of Unlawful Interference With the Independent Union, Is Insupportable as a Matter of Law.

After it had, presumably, reconsidered the "lockout" issues, the Board adhered to its original finding, "that the Respondent locked out its employees to force immediate acceptance of *Respondent's* new contract terms by the incumbent . . . Union, and then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, all for the purpose of keeping the incumbent Union subservient to it as a bargaining representative and preventing the rival Teamsters from becoming the bargaining representative", in violation of Section 8(a)(2) of the Act [R. 85].

Let us first examine the Board's charge that Petitioner "forced acceptance of *its* contract". In dealing with this finding, Petitioner must also assume, *arguendo,* that no agreement was reached prior to Monday,

1 April. Otherwise, Petitioner could hardly be said to have "forced acceptance" of a contract which was already agreed to. However, if we accept the Board's view, the situation when the employees reported for work that day can only be characterized as an impasse. According to the Board, the parties had not resolved any of the differences between them on the central issues in negotiation, and neither side was willing to allow a concession or negotiation on the other's terms—this, even after numerous meetings and discussions.[22]

In just such a situation, an employer is entitled to utilize economic pressure in the specific form of a lock out for the express purpose of "forcing" agreement on its terms. *American Ship, supra.* The question before the Court in that case was stated as follows:

> ". . . whether an employer commits an unfair labor practice . . . when he temporarily lays off or 'locks out' his employees during a labor dispute to bring economic pressure in support of his bargaining position." (380 U.S. at pp. 301-2).

The Court's holding on this point was that no violation occurs, "when, after a bargaining impasse has been reached [the employer], temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." (380 U.S. at page 318).

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[22]Under remarkably similar circumstances the Trial Examiner and the Board in *American Ship* found impasse to have been reached. (*Id.* at pp. 302, 305.) See also *Taft Broadcasting Co.*, 163 NLRB No. 55 (1967).

Thus, even if Petitioner's motive for the lock out were "forcing acceptance of its contract", there can be no question but that such activity is now fully protected.[23]

Manifestly, there is nothing more presented by the evidence in this case than a situation falling squarely within the intendment of the above holding. Even conceding that the Tonkins actually locked-out their employees, this conduct was clearly directed towards securing agreement on the most favorable possible terms. The vice with which they are here "charged" is having done just exactly that. That is to say with having utilized the lock-out to "force" the Independent into signing a contract.

We next turn to a consideration of the second portion of the Board's finding, that Petitioner "then used this new contract to obstruct the representation petition filed by the rival Teamsters with the Board, . . . and preventing the rival Teamsters from becoming the bargaining representative." [R. 85].

This finding constitutes a patent attempt by the Board to bootstrap its decision by imputing to Petitioner an *animus* toward the Teamsters Union which would render Petitioner's "lock-out" unlawful. The difficulty here is that Petitioner's recognition and dealings with the Independent Union, as well as its subsequent assertion of the new contract as a bar to the

[23]And under Petitioner's view that agreement had been previously reached, its lock out to force *execution* of the contract is equally permissible. If *American Ship* permits the employer to lock out in order to pressure the union into accepting its proposals, a lock out to force the Union to sign a contract already agreed to, pursuant to Section 8(d) of the Act, presents *a fortiori* case.

Teamsters petition, were all perfectly within the law and the Board's contrary finding is diametrically opposed to its own prior decisions.

First of all, it should be recalled that Barwise testified that his *first contact* with the Teamsters and the first attempts to solicit authorizations on their behalf did not take place until Sunday, 31 March, 1963. (And there was no evidence that any other employee had previously met with that union.)[24] Therefore, on any view of the evidence, Petitioner's management could have had no actual knowledge of this whatever until the fact was volunteered by Barwise after the contract had been signed on 1 April [Tr. 36; 270-1].[25]

No claim of representation was made by the Teamsters until Tuesday, 2 April, when its Petition was filed and this did not come to Petitioner's attention until at least the 4th or 5th when a copy was received in the mail. The so-called "lock-out", therefore antedated not only the Teamsters petition, but the events which called it to Petitioner's notice.[26]

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[24]The opinion of this Court in the original case, *NLRB v. Tonkin Corporation, etc.,* was, therefore, mistaken when it declared: "The record also discloses evidence of side-line proselytizing efforts on the part of the Teamsters' Union, which were intimately interlaced with . . . the earlier company—union contract negotiations." (352 F. 2d 509, 510-11).

[25]Harry Tonkin did comment on Friday evening that he had "heard reports" of Teamster solicitation efforts [Tr. 271]. These "reports" were apparently erroneous. But even assuming Tonkin was "aware" of Teamster interest or activity, albeit mistakenly, he could not know its *extent.* And Tonkin was not required to assume that the Teamsters had majority support; on the contrary, he would have been forbidden by law to act on mere surmise. Until presented with concrete evidence, he was duty bound to negotiate with the Independent Union.

[26]Certain of the testimony indicates that the Teamsters may have succeeded, on 1 April, in obtaining signatures of a ma-

Not only would it be grossly unfair to penalize Petitioner for utilizing legitimate economic pressure *vis-a-vis* the acknowledged representative of its employees, merely because this might have an incidental adverse affect upon the *subsequently asserted* claim of a rival union to representation, but such a penalty also contravenes the Board's own decisions.

The Board has, in similar situations involving competing unions, ruled that an employer is free to deal with the union representing the majority of its employees, even though it may be aware of the organizing activity of a second union. And a contract executed betweeen the employer and the majority union will, in such a situation, if effective immediately or retroactively, bar a petition filed by a rival Union assuming the employer has not been informed at the time of execution that such a petition has been filed. *Deluxe Metal Furniture Company,* 121 NLRB 995, 999 (1958).[27] As the Teamsters' petition in the case at bar concededly was not filed until the day following execution of the agreement, Petitioner was perfectly within its rights to assert the contract as a bar to that petition.

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jority of employees on authorization cards [Tr. 28-9]. However, this "fact" did not come to Petitioner's attention until the hearing held before the Trial Examiner, and the Teamsters never did make a demand for recognition based on the cards allegedly obtained.

[27]Ironically enough, the Board's Trial Examiner followed this rule in the case at bar. He found that, "Although in late March, the Respondent [Petitioner herein] was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that the Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could." [R. 21-2].

Indeed, every time an employer asserts a contract as a bar to a representation petition he is "obstructing" that petition and "preventing the rival union from becoming the bargaining representative", to use the Board's characterization. Yet the Board's rule, as enunciated in *Deluxe Metal, supra,* allows an employer, in the interest of stable labor relations to negotiate freely with a majority union, enter an agreement, and assert that agreement as a bar without fear that such activity will be turned against it in the form of an unfair labor practice charge.

Nevertheless, this latter is precisely what the Board seeks to do in the instant case. Surely if an employer may deal with a majority union and reach agreement, even in the face of rival union activity, prior to the filing of a petition, it may use all the economic weapons at its disposal, including a lock out, to reach agreement with that union. Under the Board's holding in *this* case, an employer would be precluded from utilizing a lock-out, even though sanctioned by *American Ship,* where it was aware of rival union activity, for fear that it would be accused of "obstructing" that rival union's claim. Such a result is, of course, unfair and illogical, for it makes the employer's use of the lock-out depend on the presence or absence of a competing union, a circumstance wholly outside the employer's control.

To further illustrate the incongruity of the Board's position, if the Petitioner had, on 1 April 1963, refused to bargain with the Independent Union on the mere ground that it was "aware" of organizing activity on

behalf of the Teamsters, it would unquestionably have violated Section 8(a)(5) of the Act.[28] And it would have been no defense to such a charge that Petitioner's employees subsequently signed authorization cards on behalf of a rival union. In fact, just such a defense has been rejected by this Court. *NLRB v. Kellogg's Inc.,* 347 F. 2d 219 (9th Cir. 1965); *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962). In *Snow* this Court declared, "The fact as to whether an employer entertained a genuine doubt that a union represents a majority of the employees is to be determined as of the time the employer refused to recognize the union. Once it is shown that the employer entertained no genuine doubt of this kind at the time it refused to bargain, an unfair labor practice has been established. The fact that, as it later developed, there were grounds which might have created a genuine doubt at that time is immaterial."

Thus, on the present posture of this case, Petitioner is damned if it does and damned if it doesn't. Dealing with the Independent Union subjects it to charges of "interference", while refusal to deal with the Independent subjects it to charges of "refusal to bargain". Petitioner submits that it chose the proper course in resolving this dilemma, by continuing to deal and to negotiate with the Independent Union which was the true representative of its employees during the critical time.

The final portion of the Board's original conclusion is that the Petitioner's "lock-out" was conducted "For the

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[28]Petitioner was in fact accused of such a violation in the Independent's original Charge [GCX la; R. 3].

purpose of keeping the incumbent union subservient to it as a bargaining representative." [R. 85]. We have previously pointed out that there is no evidence in the record nor any finding that the Independent Union was ever subservient *in the first instance.* The facts show the Independent Union to have been an adroit and resourceful representative of its membership and one completely free of any domination or control on the part of Petitioner. Thus, there is no warrant for any inference that the Independent was subservient or easily manipulated. The evidence indicates that it was a labor organization in every sense of the word toward which Petitioner was obligated to conduct itself in accordance with its statutory and contractual obligations.

B. It Was Not Petitioner's Use of the "Lock-Out" Which "Frustrated the Process of Collective Bargaining" or "Rendered the Incumbent Union Incapable of Effective Representation;" Rather, Any Such Consequences Were Attributable to Teamster Interference and the Desertion of the Independent by its Own Leadership.

The Board's finding that this Petitioner "frustrated the process of collective bargaining" [R. 85] is intentionally couched in the wording of the majority opinion in *American Ship,*[29] in an effort to distinguish the case at bar. But the language alluded to affords the Board no solace. On the contrary, it is evident that Petitioner

[29]Thus, speaking for the majority, Mr. Justice Stewart noted: "There was no evidence and no finding that the employer was hostile to its employees banding together for collective bargaining or that the lock-out was designed to discipline them for doing so. It is therefore inaccurate to say that the employer's intention was to destroy or frustrate the process of collective bargaining." (380 U.S. at 309).

was agreeable to bargaining with its employees through the Independent Union as their majority representative, even going to the extent of engaging in a "lock-out", says the Board, to secure acceptance by that Union of its contract terms. Suffice it to say that this was precisely the intention and motive of the Petitioner in the *American Ship* case.

In point of fact, if anyone was guilty of "destroying" or "frustrating" the collective bargaining process, it was the Union's own officers, aided and abetted by the Teamsters, who admittedly set forth, in blatant breach of their fiduciary obligations to the membership, to create a claim on behalf of that rival union and thereby void the agreement previously negotiated. Hill and Barwise, the Independent Union's President and Secretary-Treasurer, respectively, admitted quite candidly to signing Teamster authorization cards on the day before the agreement was to be submitted for employee ratification. Moreover, additional signatures were solicted during the Independent's own meeting the following morning.[30]

The Teamster orientation of the Union's officers readily explains the confusion and reversal of form evidenced on Monday morning. However, the attempt of the officers to subvert the agreement was quite apparently rejected by the membership, for otherwise Hill and Bar-

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[30]William Barwise testified that the results of the vote taken on 1 April were 9 to 8 against ratification [Tr. 31; 33]. Barwise further testified that he secured nine signatures as of Monday morning on behalf of the Teamsters, including those of himself and Hill [Tr. 28-9]. It may be safely assumed, therefore, that the Union's officers not only voted *against* the pact they had previously agreed to, but that their vote also made the difference between majority approval and disapproval.

wise would never have agreed to sign the contract. Execution of the agreement, therefore, was not only a victory for Petitioner, but a victory for the rank-and-file of the Independent over its defecting officers.

We may be permitted to wonder how Petitioner's conduct might have been characterized had it repudiated its contractual obligations and made overtures to another Union, or had it attempted to evade them by transferring assets, relocating its plant, or some such similar device. Yet the conduct indulged in by the Independent's officers amounted to the counterpart of this precise sort of thing. The breach of trust committed by the Union officers here, is not a minor matter; these officers violated the provisions of Fderal law.[31]

The point is that the Board would punish Petitioner for fulfilling its obligations and abiding by its responsibilities by characterizing its conduct and the sum of its efforts at good faith negotiation and settlement as "unlawful interference".[32] On the other hand, incred-

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[31]Section 501(a) of the Landrum-Griffin Act, 29 U.S.C. Section 501(a) provides in part: "The officers . . . of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, . . . *to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties . . .*" (Emphasis added). See also *Johnson v. Nelson,* 325 F. 2d 646 (8th Cir. 1963), in which the reviewing court said of this statute, "thus it plainly appears that the statute is broad in its reach. Officers and other union representatives may not act adversely to their organization or to the members as a group, or acquire a personal interest which is contrary to the interests of the organization. Being trustees the officers must subvert their own personal interests to the lawful mandates and orders of the organization." (At p. 650).

[32]That Petitioner's alleged "lock-out" cannot, *per se,* be said to have destroyed the Independent's capacity for effective representation is evident from the following excerpt from

ibly, the most flagrant breach of obligation and repudiation of responsibility on the part of the Independent's officers is being capitalized on and even rewarded.

In addition, the Board has seen fit to completely overlook the interference of the Teamsters Union in the affairs of the Independent. Unquestionably the Teamsters' belated claim to representation would have been unavailing had the Independent's officers ratified the agreement reached in substance on Friday. This is the reason for that Union's last-ditch effort, successful it seems, in suborning the defection of the Independent's officers.

It may well be inferred that there was wrongful interference in this case, but if the Independent was "incapable of effective and responsible representation" during the events in question, its lack of viability is attributable to the Teamsters, not this Petitioner.

C. The Board's Finding of an 8(a)(3) Violation Based on Petitioner's Purported "Lock-Out" to "Discourage" Teamster Membership Has No Support in Fact or Law.

As we have previously pointed out, the Board, in its Supplemental Decision, has taken great pains to attempt to distinguish the instant case from *American Ship* by drawing upon language in that opinion which was not necessary to the decision of the matter. Here the Board attributes to Petitioner the "proscribed pur-

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American Ship: "Moreover, there is no indication, either as a general matter or in this specific case, that the lock-out will necessarily destroy the Union's capacity for effective and responsible representation. The unions here involved have vigorously represented the employees . . . and there is nothing to show that their ability to do so has been impaired by the lock-out" (380 U.S. at p. 309).

pose" of *encouraging* membership in the incumbent union and *discouraging* membership in the Teamsters [R. 85]. This finding, in turn, is based on the following language of American Ship: ". . . for that section, [8 (a) (3)], requires an intention to discourage union membership or otherwise discriminate against the union. There was not the slightest evidence, and there was no finding, that the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to effect the outcome of the particular negotiations in which it was involved." (380 U.S. at 313).

Even a cursory reading of the above language indicates that the *American Ship* court was concerned with whether the lock-out was aimed at "discouraging" membership in the union *which had been locked out.* This is not the situation here. *American Ship* did not presume to deal with an employer's use of the lock-out in the context of rival union claims.[33] However, as we point out above, the Board itself has unequivocally held that an employer is free to deal with a majority union and to execute an agreement at any time before he is aware of a rival union's representation petition.[34]

There is no gainsaying that the Tonkins' primary motive was to bring about a settlement of the contract dispute on favorable terms. Quite naturally, the effect

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[33]This Court, however, has previously considered such a case. In *NLRB v. Golden State Bottling Company, etc.,* 353 F. 2d 667 (9th Cir. 1965) the Court disposed of Board findings practically identical to those asserted here.

[34]*Deluxe Metal Furniture Company, supra; Portland Associated Mortician's Inc.,* 163 NLRB No. 76 (April 2, 1967).

of executing an agreement with the Independent Union was to "discourage" membership in the rival Teamsters. But this element is present in every case in which an employer refuses to deal with one union in favor of another. Under the instant facts, because the Teamsters' Petition was not timely, Petitioner's dealings with the Independent, including the "lock-out", were lawful, protected activities, the Board's characterization to the contrary notwithstanding.[35]

In further support of its finding the Board alludes to Harry Tonkin's statement on Friday evening, "That he did not want to negotiate with the Teamsters, that he wanted to continue to do business with the Union rather than the Teamsters." [R. 82]. We reiterate that there was nothing illegal in expressing a desire to negotiate with the majority representative of his employees. *Cf. Coronet Mfg. Co.,* 133 NLRB 641 (1960).

It must be remembered that at the time of Tonkin's alleged remarks no rival claim to representation had

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[35]The majority in American Ship rejected a similar contention raised by the Board there in the following manner: "Similarly, it does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest. In fact, it is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. There is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that employer conditioned rehiring upon resignation from the union. It is true that the employees suffered economic disadvantage because of their union's insistence on demands unacceptable to the employer, but this is also true of many steps which an employer may take during a bargaining conflict and the existence of an arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of §8(a)(3) absent some unlawful intention." (380 U.S. 312-13).

been asserted, nor had any action to this end been undertaken. On Friday evening, Tonkin stressed throughout his address that Petitioner's dealings with the Independent in the past had been harmonious and beneficial to both sides, and he cited this as one of the advantages to the employees of dealing through their own union. By way of comparison, merely, he adverted to some of the consequences which might flow from representation by a larger union with other affiliations, such as the Teamsters, which might embroil the men in disputes not of their own making [Tr. 255-60; 271-3; 295-6].

Tonkin was careful not to suggest anything which might be inferred as infringing on the employees free choice of a representative. In fact, he prefaced his comments by emphasizing that Petitioner had "no quarrel with any union any place." [Tr. 271]. As Tonkin quite clearly put it, Petitioner was obligated to deal with the Independent; it was doing so and there was simply no question presented, at that time, of dealing with anyone else [Tr. 272-3]. Under these circumstances, Tonkin's remarks were proper. Absent threats or coercion, not here found, it is perfectly permissible for an employee to express a preference for one of two competing unions. Nor, as we have seen, does it constitute interference to continue to recognize and deal with a union previously dealt with, even during a rival union's organization campaign. *Stewart Warner Corp.*, 31 LRRM 1397, 102 NLRB No. 310 (1955); *Rold Gold of California,* 43 LRRM 1421, 123 NLRB No. 24 (1959).

Generally, an employer may point out to its employees the advantages of withdrawing from an existing union and forming one of their own, without loss of benefits [*Juvenile Manufacturing,* 40 LRRM 1040, 117 NLRB No. 201 (1957)], or question the integrity of a union or its officials or advert to adverse consequences of union membership, such as strikes. See *Rand Central Aircraft,* 31 LRRM 1616, 103 NLRB No. 101 (1952); *Penokee Veneer,* 20 LRRM 1273, 74 NLRB 249 (1947). Harry Tonkin's remarks said no more than this at most, and, in fact, fell far short of the statements held by these cases to be well within realm of legitimate employer comment.

The Board urges as additional evidence of Petitioner's unlawful motivation this Court's finding, on its original petition for enforcement, that Petitioner discharged employee Barwise because of his activity on behalf of the Teamsters in violation of Section 8(a)(1) and (3).[36] [R. 85]. In the first place, this Court was far from satisfied as to the reasons for Barwise's discharge and affirmed the Board's finding solely because there was evidence in the record to support an inference of discrimination.[37]

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[36]It is worthy of note that similar charges respecting employee Olson were found by the Board to be without merit [R. 21; 71].

[37]Thus, this Court stated with regard to Barwise: "Looking now to those portions of the Board's order directing the reinstatement and compensation Barwise, *we find the evidence in conflict as to reasons for the discharge; and the record is by no means unequivocal in view of Barwise's less-than-satisfactory history of performance in the sales promotion of respondent's product.* However, respondent's knowledge of Barwise's efforts on behalf of Teamster representation, coupled with the timing

(This footnote is continued on the next page)

Moreover, it is not disputed that the fact of Barwise's activity on behalf of the Teamsters was not communicated to the Tonkins until after the contract was executed, and the "lock-out" had ended. For this reason, the Barwise episode hardly provides solid evidence of the Tonkins' motivation for instituting the "lock-out" which had taken place earlier.

Lastly, the Board points to Petitioner's alleged "intervention" in forwarding a copy of the new contract to its Regional Director on behalf of the Independent Union [R. 84]. With regard to this incident, the record supports only the inference that union officials presented an equivocal request to Millard Tonkin to transmit copies of the contract on behalf of the Independent Union. We say "equivocal" because it now seems obvious that officers Hill and Barwise were desirous of undermining the Independent Union's position in the representation case, but had no wish to make it apparent to management that they were doing so. As the original decision itself notes, they apparently wished to be able to say that Petitioner had thus "evidenced to the Board an interest in representation on the part of the union that *its officers* did not care to assert." [R. 18].

It will be noted that this decision does not accuse Petitioner of misrepresenting the *union's* position. The distinction is important, particularly in view of the de-

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of the discharge, persuade us that the Board could reasonably have drawn the inference it did from the facts in evidence and all surrounding circumstances, notwithstanding the existence of justifiable grounds which, under other circumstances, might have permitted dismissal." (352 F. 2d 509, 511). (Emphasis added).

cision's acceptance of Millard Tonkin's testimony that he sent in copies of the agreement over the printed signature of the union "upon the understanding . . . that the union officials were agreeable to such a course, or perhaps even desirous of it . . ." [R. 18]. The Board's conclusion thus turns, not upon Peitioner's motivation, but rather upon the undisclosed intent of the Union's officers—and it is therefore untenable.

On any reasonable view, the evidence discloses merely that Tonkin believed he was accommodating Hill and Barwise by assisting them to comply with what the parties took to be a direct request by the Regional Director. Further, there is no evidence that the Union's rank-and-file was contacted by the officers or that *their* position on the matter was solicited. Indeed, Hill and Barwise took their advice from a *Teamster* representative [Tr. 38-39]. Management's act in submitting a contract on behalf of the Independent, was in conformity with their wholly reasonable supposition that the Independent wished to communicate to the Board its interest in the matter.

VII.
CONCLUSION.

Petitioner earnestly submits that the record in this case, fairly viewed and in its entire context, discloses only a history of good faith dealing on the part of an employer with the acknowledged representative of its employees.

If the events in this case are viewed in such a context, they inexorably lead to the conclusion that the Board's findings herein are totally without founda-

tion. The great weight of evidences establishes that prior agreement was reached orally on the terms of the new contract and that Petitioner's subsequent activities were aimed solely at insuring its formal execution. But even assuming that Petitioner had not reached agreement with the Independent and had engaged in a "lock-out" to bring economic pressure to bear and force the union to accept its contract terms, such activity was in aid of Petitioner's good faith bargaining position and fully protected by the *American Ship* decision.

The Board's attempts to distinguish that case have forced it to a totally unrealistic and illogical position. For many years prior to the events in question Petitioner had recognized and dealt with the Independent Union. Had it broken off negotiations or refused to deal with it, it would have been guilty of unlawful refusal to bargain. Had it demonstrated or extended preference or support to the Teamsters claim at any tme it would have been equally guilty of unfair practices. And yet, if the Board's findings be given close scrutiny it is punishing Petitioner for not having done these very things. Even in the exercise of its clairvoyant hind-sight, the Board does not indicate just how Petitioner, consistent with the obligations imposed on it by the Act, might have acted otherwise, in the premises. In short, the decision is not only without support in the evidence, but contradicts the law *and* itself in the bargain. We most earnestly request that enforcement, accordingly, be denied.

Respectfully submitted,

HILL, FARRER & BURRILL,
M. B. JACKSON,
KYLE D. BROWN,
Attorneys for Petitioner.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KYLE D. BROWN

APPENDIX.

National Labor Relations Act.

Sec. 7: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in 8(a) (3).

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an

agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)] and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Sec. 10(f): Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manners as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.